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No. 87-1720

In The
Supreme Court of the United States
October Term, 1987

HUBERT C. TAYLOR,

Petitioner,

v.

PEABODY COAL *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF RESPONDENTS PEABODY COAL COMPANY AND OLD REPUBLIC INSURANCE COMPANY IN OPPOSITION

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LIST OF PARTIES AND RULE 28.1 STATEMENT

This is a petition for a writ of certiorari seeking review of a denial of benefits under the Black Lung Benefits Act, 30 U.S.C. §§ 901-945. Hubert C. Taylor ("Taylor") is the claimant. The Peabody Coal Company ("Peabody") is the mine owner that last employed Taylor. The Old Republic Insurance Company is Peabody's black lung insurance company. The Director, Office of Workers' Compensation Programs, United States Department of Labor, is the administrator of the black lung program and is a statutory party in all black lung claims litigation, 30 U.S.C. § 932(k). Taylor was the petitioner in the Seventh Circuit. Peabody, Old Republic and the Director were respondents in the Seventh Circuit. The Peabody Coal Company is an independent corporate entity having no affiliation that must be reported under Supreme Court Rule 28.1. The Old Republic Insurance Company is a wholly-owned subsidiary of the Old Republic International Corporation.

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Respondents Peabody Coal Company and Old Republic Insurance Company, respectfully request that this Court deny the petition for a writ of certiorari seeking review of the Seventh Circuit's opinion in this case, reported at 838 F.2d 227. In the alternative, these Respondents join in Petitioner's request that the petition be held in abeyance pending the disposition of *Pittston Coal Group v. Sebben,* Nos. 87-821, 87-827, and 87-1095 (consolidated).

STATUTES AND REGULATIONS INVOLVED

This action involves the following regulations:

1. The Social Security Administration Interim Presumption, 20 C.F.R. § 410.490 (1987).
2. The Department of Labor Interim Presumption, 20 C.F.R. § 727.203 (1987).

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STATEMENT OF THE CASE

On June 6, 1977, Hubert C. Taylor ("Taylor") filed a claim under the Black Lung Benefits Act, 30 U.S.C. §§ 901-945 (the "Act"). Peabody was notified of the claim by the U.S. Department of Labor and denied liability for it on the grounds that Taylor was not totally disabled by pneumonoconiosis ("black lung disease") arising out of coal mine employment. Following a formal hearing, the Administrative Law Judge ("ALJ") issued a Decision and Order awarding benefits on August 29, 1985. Pet. App. 11a.

The ALJ first considered the claim under an eligibility rule called the "interim presumption." 20 C.F.R. § 727.203 (1987). This rule was published by the Secretary of Labor for application in Department of Labor black lung claims. *See Mullins Coal Co., Inc. of Virginia v. Director, Office of Workers' Compensation Programs,* 108 S.Ct. 427 (1987). This presumption was invoked on the basis of positive chest x-ray evidence and in light of Taylor's forty-two years of coal mine employment. Pet. App. 14a, 24a. Following a review of all relevant medical evidence, the ALJ

concluded that Taylor's black lung disease was not disabling and the Labor Department presumption was, therefore, rebutted. 20 C.F.R. § 727.203(b)(2).

There is, however, another interim presumption promulgated by the Social Security Administration ("SSA") for application in black lung claims within the jurisdiction of SSA. 20 C.F.R. § 410.490 (1987). While the plain language of the SSA rule does not permit its application in Labor Department claims, several circuits have held that the SSA rule can be so applied if it helps the claimant obtain benefits. Pet. App. 27a. Applying the SSA rule, which does not generally permit rebuttal, the ALJ awarded benefits to Taylor.

Peabody appealed to the Benefits Review Board under 33 U.S.C. § 921 incorporated into 30 U.S.C. § 932(a). The Board reversed, holding that the SSA rule could be applied only in those cases arising within the jurisdiction of a circuit that had previously held the SSA rule applicable. Pet. App. 9a. The Seventh Circuit had never so held. Therefore, the ALJ's finding of rebuttal of the Labor Department's interim presumption controlled and required that Taylor's claim be denied.

The Seventh Circuit affirmed, relying on its previous decision, holding that the SSA rule does not apply in Department of Labor claims. *Strike v. Director, Office of Workers' Compensation Programs*, 817 F.2d 395 (7th Cir. 1987).

———o———

REASONS WHY THE PETITION SHOULD BE DENIED

Taylor asks this Court to hold his petition in abeyance until the Court decides *Pittston Coal Group v. Sebben*, Nos. 87-821, 87-827, 87-1095 (consolidated), *cert. granted*, 108 S.Ct. 1288 (1988). Although Peabody believes that the Seventh Circuit's opinion on the merits here was correct and that *Pittston Coal Group* and its companion cases will not necessarily dispose of Taylor's appeal, we have no objection to the request that this case be held in abeyance.

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CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied, or in the alternative, held in abeyance.

Respectfully submitted,

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